

December 22 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. _____

FAX - FILED

RANDALL M. QUAM,

Appellant,

vs.

JAMES R. HALVERSON,

Appellee.

DEC 22 2009

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

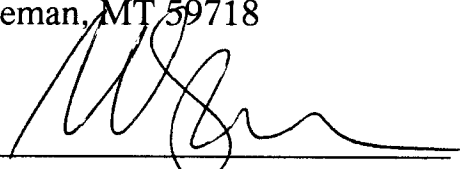
NOTICE OF APPEAL

NOTICE is given that Randall M. Quam, plaintiff in *Randall M. Quam v. James R. Halverson*, Eighteenth Judicial District Court Cause No. DV-09-249B, hereby appeals: (1) the District Court's dismissal of his amended complaint, by Decision and Order dated November 24, 2009; (2) the District Court's denial, by omission, of his motion for leave to file a second amended complaint; and (3) the District Court's denial of his motion for summary judgment, also by Decision and Order dated November 24, 2009, copy attached.

Quam certifies that: (1) this appeal is subject to mediation, and the amount at issue is more than \$5,000.00; (2) this is not an appeal from an order certified as final under Rule 54(b), M.R.Civ.P; (3) this appeal does not challenge the constitutionality of any act of the Montana legislature; (4) all available transcripts have been ordered; and (5) this Notice of Appeal is accompanied by the required filing fee.

DATED this 22 day of December, 2009.

Martin R. Studer
638 Ferguson Ave., Ste. 1
Bozeman, MT 59718



Martin R. Studer
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Notice of Appeal will be faxed to the Clerk of Supreme Court at 3:15 pm and served upon the following by depositing the same, postage paid and addressed as indicated, in the mail this 22 day of December, 2009.

Allan Baris
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Jennifer Brandon
Clerk of Court
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Martin R. Studer

CLERK OF DISTRICT COURT
JENNIFER BRADON

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * *

RANDALL M. QUAM,

Plaintiff,

vs.

JAMES R. HALVERSON,

Defendant.

Cause No. DV-09-249B

DECISION AND ORDER

On April 14, 2009, Defendant James R. Halverson ("Halverson") filed Defendant's Rule 12(b)(6) Motion to Dismiss. On April 21, 2009, Halverson filed Defendant's Brief in Support of Rule 12(b)(6) Motion to Dismiss. On May 21, 2009, Plaintiff Randall M. Quam ("Quam") filed Plaintiff's Response to Defendant's Motion to Dismiss and Plaintiff's Motion for Summary Judgment. On June 17, 2009, Halverson filed Defendant's Reply Brief in Support of Motion to Dismiss and in Response to Plaintiff's Motion for Summary Judgment. On July 20, 2009, Quam filed Plaintiff's Request for Hearing and Supplemental Brief in Opposition to Defendant's Motion to Dismiss and Plaintiff's Reply Brief in Support of Motion for Summary Judgment. On August 4, 2009, Halverson filed Defendant's Reply Brief on Motion for Stay and Objection to Plaintiff's Supplemental Brief in Opposition to Defendant's Motion to Dismiss.

On October 22, 2009, a hearing was held on Defendant's Rule 12(b)(6) Motion to Dismiss and Plaintiff's Motion for Summary Judgment. Martin Studer represented Quam. Allan Baris represented Halverson.

On October 23, 2009, the Court issued an Order Requiring Additional Briefing and Quam filed Plaintiff's Supplemental Brief Re: Issues Raised in Oral Argument. On November 12, 2009, Halverson filed his Supplemental Brief in Support of Rule 12(b)(6) Motion to Dismiss on Private Cause of Action Under Article II, § 10 of the Montana Constitution.

From reviewing the briefs, filings, and arguments of counsel, the Court is fully advised.

BACKGROUND

The following facts are not in dispute. Quam was involved in a motor vehicle accident with Nancy Sebens ("Sebens") in July of 2005. Quam alleges that his neck was injured in this accident and has filed suit against Sebens for damages ("accident suit"). The accident suit is currently pending before this Court. Halverson represents Sebens in the accident suit.

On January 27, 2009, Halverson issued a subpoena duces tecum on Dr. John Campbell ("Campbell") of Bridger Orthopedic and Sports Medicine ("Bridger Orthopedic"). The subpoena "commanded" Campbell and Bridger Orthopedic to produce "all of [their] records regarding . . . Quam, including, but not limited to medical records, notes, charts, radiology reports, medical bills, and correspondence." Compl. ex. 1 (Mar. 18, 2009). Campbell and Bridger Orthopedic produced the records in accordance with the subpoena.

Quam then filed this suit against Halverson alleging that the means by which Halverson obtained his medical records violated § 50-16-536(1), MCA, Rule 45(b)(1), M.R.Civ.P., and his constitutional right to privacy. Compl. ¶¶ 9-10; Amend. Compl. ¶¶ 9-10 (Mar. 26, 2009). In his Response to Halverson's Motion to Dismiss, Quam has also alleged that Halverson's issuance of the subpoena violated § 50-16-536(2), MCA. Pl.'s Response to Def.'s Mot. to Dismiss, & Pl.'s Mot. for S.J. 5 (May 21, 2009).

DISCUSSION

I. Defendant's Rule 12(b)(6) Motion to Dismiss

Pursuant to Rule 12(b)(6), M.R.Civ.P., Halverson contends that Quam's Amended Complaint should be dismissed on the grounds that it fails to state a claim upon which relief can be granted. Def.'s R. 12(b)(6) Mot. to Dismiss 1 (Apr. 14, 2009).

According to the Montana Supreme Court:

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true . . . [H]owever, the court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated.

Cowan v. Cowan, 2004 MT 97, ¶¶ 10, 11, 14, 321 Mont. 13, 89 P.3d 6.

A. § 50-16-536(1), MCA

Quam contends that Halverson violated § 50-16-536(1), MCA by failing to give him or his counsel ten days written notice of the subpoena prior to its issuance. Amend. Compl. ¶ 6. Section 50-16-536(1), MCA provides that:

Unless the court for good cause shown determines that the notification should be waived or modified, if health care information is sought under 50-16-535(1)(b), (1)(d), or (1)(e) or in a civil proceeding or investigation under 50-16-535(1)(j), the person seeking discovery or compulsory process shall mail a notice by first-class mail to the patient or the patient's attorney of record of the compulsory process or discovery request at least 10 days before presenting the certificate required under subsection (2) of this section to the health care provider.

Halverson does not dispute that he failed to give Quam or Quam's counsel ten days written notice of the subpoena prior to its issuance, but contends that because he relied on § 50-16-535(1)(c) when issuing the subpoena he was not required by § 50-16-536(1), MCA to give such notice. Def.'s Br. in Support of R. 12(b)(6) Mot. to Dismiss 3-4 (Apr. 21, 2009).

The plain language of § 50-16-536(1), MCA requires ten days written notice of a subpoena to be provided to a patient or the patient's attorney if "health care information is sought under § 50-16-535(1)(b), (1)(d), or (1)(e) or in a civil proceeding or investigation under § 50-16-535(1)(j)." If health care information is not sought pursuant to one of the aforementioned statutory provisions, § 50-16-536(1), MCA is inapplicable.

Quam did not plead in his original Complaint or his Amended Complaint that Halverson sought his health care information pursuant to § 50-16-535(1)(b), (1)(d), (1)(e), or (1)(j), MCA. *See* Compl.; Amend. Compl. Accordingly, pursuant to Rule 12(b)(6) and the Montana Supreme Court's decision in *Cowan*, the Court finds that Quam's Amended Complaint should be dismissed without prejudice to the extent that it seeks recovery for Halverson's alleged violation of § 50-16-536(1), MCA.

B. § 50-16-536(2), MCA

In his Response to Halverson's Motion to Dismiss, Quam contends that Halverson's issuance of the subpoena violated § 50-16-536(2), MCA because it lacked the requisite

certification. Pl.'s Response to Def.'s Mot. to Dismiss & Pl.'s Mot. for S.J. 5. Section 50-16-536(2), MCA provides that:

Service of compulsory process or discovery requests upon a health care provider must be accompanied by a written certification, signed by the person seeking to obtain health care information . . . identifying at least one subsection of 50-16-535 under which compulsory process or discovery is being sought. The certification must also state, in the case of information sought under 50-16-535(1)(b), (1)(d), or (1)(e) or in a civil proceeding under 50-16-535(1)(j), that the requirements of subsection (1) of this section for notice have been met.

Quam did not allege in his original Complaint or his Amended Complaint that Halverson violated § 50-16-536(2), MCA. *See* Compl.; Amend. Compl. Accordingly, the Court finds that Halverson's compliance or non-compliance with § 50-16-536(2), MCA is immaterial to its consideration of Defendant's Rule 12(b)(6) Motion to Dismiss.

C. Rule 45(b)(1), M.R.Civ.P.

Quam contends that Halverson violated Rule 45(b)(1), M.R.Civ.P. by failing to serve a copy of the subpoena on his counsel prior to its issuance. Amend. Compl. ¶ 5. Rule 45(b)(1), M.R.Civ.P. provides that "Prior notice of any commanded production of documents . . . shall be served on each party in the manner prescribed by rule 5(b)." Pursuant to Rule 5(b), M.R.Civ.P., when a party is represented by counsel, service shall be made upon the party's counsel unless the court orders otherwise.

For purposes of his Motion to Dismiss, Halverson admits that he failed to serve a copy of the subpoena on Quam's counsel as required by Rule 45(b)(1), M.R.Civ.P. Def.'s Br. in Support of R. 12(b)(6) Mot. to Dismiss 4. However, Halverson contends that because "there is no known authority for a separate cause of action based on a violation of [Rule 45(b)(1), M.R.Civ.P.]," Quam can only seek relief in the action in which the subpoena was issued (i.e. the accident suit). Def.'s Br. in Support of R. 12(b)(6) Mot. to Dismiss 5.

Quam contends that he can bring a separate cause of action against Halverson for his alleged violation of Rule 45(b)(1), M.R.Civ.P. pursuant to §§ 27-1-104, 27-1-105(2), 27-1-107, 27-1-202, and 27-1-701, MCA; *Deserly v. Department of Corrections*, 2000 MT 42, ¶ 17, 298 Mont. 328, 995 P.2d 972; and *Jaap v. District Court of the Eighth Judicial District* (1981), 191 Mont. 319, 323, 623 P.2d 1389, 1392. Pl.'s Response to Def.'s Mot. to Dismiss, & Pl.'s Mot. for S.J. 10, 12. The Court does not find Quam's contentions persuasive.

The statutory provisions cited by Quam recognize an expansive range of civil actions but have not been construed to permit an independent cause of action for an alleged violation of the Montana Rules of Civil Procedure. Pl.'s Response to Def.'s Mot. to Dismiss, & Pl.'s Mot. for S.J. 10 (citing §§ 27-1-104, 27-1-105(2), 27-1-107, 27-1-202, and 27-1-701, MCA).

In *Deserly*, the plaintiff sued the Montana Department of Corrections alleging that her constitutional right to privacy was violated when she was subjected to a strip search while visiting her husband at the state penitentiary. *Deserly*, ¶ 2. *Deserly* had nothing to do with the Montana Rules of Civil Procedure and is inapplicable to the Court's consideration of this issue.

In *Jaap*, the Montana Supreme Court held that the district court did not have the authority to order private interviews between counsel for one party and possible adversary witnesses because "the sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery are not available for private interviews." Unlike the private interviews ordered by the district court in *Jaap*, the subpoena at issue in this case is an "ordinary method of discovery" for which the Montana Rules of Civil Procedure provide adequate sanctions and protections. Rule 26(a), (c), M.R.Civ.P.

Rule 26(c), M.R.Civ.P. provides that "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"

Rule 45(c)(1), (3), M.R.Civ.P. provides that:

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee . . . On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter and no exception or waiver applies

While the sanctions and protections provided by the aforementioned Rules of Civil Procedure are often utilized before subpoenaed materials are produced, they are not limited to such application. Accordingly, the Court finds that it is "well equipped under the Montana Rules of Civil Procedure to address [discovery abuse] as it occurs . . ." and that recognition of a separate cause of action for Halverson's alleged violation of Rule 45(b)(1), M.R.Civ.P. is unnecessary. *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 32, 297 Mont. 336, 993 P.2d 11.

Due to the lack of precedent supporting recognition of an independent cause of action for an alleged violation of the Montana Rules of Civil Procedure, and the adequate sanctions and protections available to Quam in the underlying accident suit, the Court finds that Quam's Amended Complaint should be dismissed with prejudice to the extent that it seeks recovery for Halverson's alleged violation of Rule 45(b)(1), M.R.Civ.P.

D. Constitutional Right to Privacy

Quam contends that Halverson's issuance of the subpoena violated his constitutional right to privacy. Compl. ¶ 10; Amend. Compl. ¶ 10. Article II, Section 10 of the Montana Constitution provides that "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

At the October 22, 2009 hearing on Defendant's Rule 12(b)(6) Motion to Dismiss and Plaintiff's Motion for Summary Judgment, the Court raised the issue of whether or not a cause of action may be brought against a private citizen who allegedly violates an individual's constitutional right to privacy.

Halverson contends that pursuant to the Montana Supreme Court's decision in *State v. Long* (1985), 216 Mont. 65, 71, 700 P.2d 153, 157, "the privacy section of the Montana Constitution contemplates privacy invasion by state action only" and therefore individuals do not have a cause of action against private citizens who have allegedly violated their constitutional right to privacy. Supp. Br. in Support of R. 12(b)(6) Mot. to Dismiss on Priv. Cause of Action Under Article II, § 10 of the Mont. Const. 2-3 (Nov. 12, 2009).

Pursuant to Justice Nelson's special concurrence in *Associated Press, Inc. v. Montana Department of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5, and the Montana Supreme Court's decision in *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128, Quam contends that claims based on alleged invasions of an individual's right to privacy may be brought against private citizens. Pl.'s Supp. Br. Re: Issues Raised in Oral Argument 2-4 (Oct. 23, 2009). The Court does not find Quam's contentions persuasive.

In *Dorwart*, the Montana Supreme Court held that a cause of action for damages may be brought against a state actor who has allegedly violated an individual's right to privacy.

Dorwart, ¶ 77. *Dorwart* provides no support for a similar claim against a private party such as Halverson.

In *Associated Press, Inc.*, Justice Nelson, in a special concurrence, noted that:

The Declaration of Rights serves as a shield to protect each individual from the excesses of government, from the tyranny of the majority, and from the sorts of abuses perpetrated by persons, firms, corporations, associations, organizations, and institutions that, in pursuit of their own interests and agenda, effectively would deprive the people of those things essential to their humanity and to their lawful individual pursuits

Associated Press, Inc., ¶ 55. This Court is not willing to find that a cause of action may be brought against a private citizen who allegedly violates an individual's constitutional right to privacy based on a concurring opinion that conflicts with Montana Supreme Court precedent.

Pursuant to the Montana Supreme Court's decision in *Long*, the Court finds that individuals do not have a cause of action against private citizens who have allegedly violated their constitutional right to privacy. Halverson is a private citizen and was not acting under color of state law at the time he issued the allegedly unlawful subpoena. Accordingly, the Court finds that Quam's Amended Complaint should be dismissed with prejudice to the extent that it seeks recovery for Halverson's alleged violation of his constitutional right to privacy.

II. Plaintiff's Motion for Summary Judgment

Because the Court finds that Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted, Plaintiff's Motion for Summary Judgment is moot and should be denied.

IT IS HEREBY ORDERED:

1. Defendant's Rule 12(b)(6) Motion to Dismiss is **GRANTED**.
2. Plaintiff's Amended Complaint is **DISMISSED** as follows:

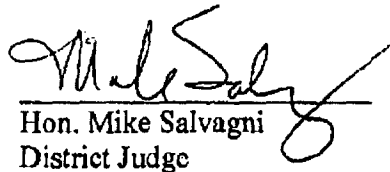
a. Plaintiff's Amended Complaint is **DISMISSED WITHOUT PREJUDICE** to the extent that it seeks recovery for Defendant's alleged violation of § 50-16-536(1), MCA.

b. Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE** to the extent that it seeks recovery for Defendant's alleged violation of Rule 45(b)(1), M.R.Civ.P.

c. Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE** to the extent that it seeks recovery for Defendant's alleged violation of his constitutional right to privacy.

3. Plaintiff's Motion for Summary Judgment is **DENIED**.

Dated this 24th day of November, 2009.


Hon. Mike Salvagni
District Judge

c: { Martin R Studer email
Allan H. Baris email }

11-25-09